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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Assessment and Collection	)	MD Docket No. 98-36
of Regulatory Fees for	)	
Fiscal Year 1998	)	

COMMENTS OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, submits these comments regarding the Notice of Proposed Rulemaking in the above-referenced proceeding (the "NPRM").

INTRODUCTION AND BACKGROUND

In the NPRM, the Commission has commenced a proceeding, which it must by statute do annually, see 47 U.S.C. § 159, to determine whether and how it should revise or amend its regulatory fee schedule. This year, among other things, the Commission has proposed an increase in regulatory fees for geostationary space stations from $97,975 to $119,000 per satellite, see NPRM Attachment F, and again proposed to require non-common carrier satellite operators to pay regulatory fees based upon the number of private international bearer circuits they provide, see NPRM Attachment H ¶ 38.

PanAmSat opposes these proposals. As PanAmSat has noted in the past, the regulatory fee proposed to be assessed against geostationary space station operators is, in fact, far out of proportion to the actual cost of regulating geostationary satellites. In addition, the Commission's extension of its international bearer circuit fee to non-common carriers violates the Communications Act and unfairly disadvantages U.S.-licensed non-common carrier satellite operators *vis-a-vis* foreign-licensed satellite operators. The Commission should, therefore, lower the regulatory fee to be paid by geostationary space station operators and exclude from its regulatory fee schedule international bearer circuits provided by non-common carrier satellite operators.

DISCUSSION

I. The Proposed Geostationary Space Station Fees Are Not Reasonably Related To The Benefits Conferred By Commission Regulation.

Section 9(b) of the Communications Act, as amended, 47 U.S.C. § 159(b)(1)(A), requires the Commission, in deriving its regulatory fees, to ensure that the fees assessed against regulated entities are reasonably related to the benefits conferred upon them by Commission regulation. The fees proposed in the NPRM for geostationary space station operators fail to satisfy this requirement.

In the NPRM, the Commission has again this year proposed an increase in geostationary space station regulatory fees, this time from $97,975 to $119,000 per satellite. As PanAmSat has noted in the past, fees in this range bear no relation to the actual costs of regulating geostationary space stations.

The Commission's decision is based upon its estimation that $5,677,869 in regulatory costs are directly attributable to regulating 46 geostationary space stations. See NPRM Attachments C & D. In other words, the Commission has estimated that it costs over $123,000 per satellite, per year, to regulate geostationary space stations. However this figure was derived, it is facially unreasonable.

Once satellite services are authorized, the Commission incurs very little regulatory expense in overseeing satellite operations. Satellite services typically are provided on a non-common carrier basis (obviating Title II tariff and enforcement activities), the Commission rarely becomes involved in interference issues for licensed satellites, and the Commission only occasionally conducts satellite rulemaking proceedings that do not relate solely to new or proposed services. In fact, the vast majority of Commission resources expended on geostationary satellite services are devoted to the satellite licensing process. These costs, however, already are recovered through the satellite application fees of more than $85,000 per geostationary satellite that applicants pay. See 47 C.F.R. § 1.1107.

The cost figure attributed in the NPRM to geostationary satellites is grossly out of proportion to the degree of regulatory oversight exercised by the Commission for this service. Consequently, application of the Commission's fee computation methodology leads to the imposition of a regulatory fee in this service that bears no relation to the benefits conferred. As such, the proposed regulatory fee for

geostationary satellites is inconsistent with the letter and purpose of Section 9 of the Communications Act.

II. The Imposition Of Fees That Are Disproportional To The Benefits Conferred By Regulation, In Combination With The Jurisdiction Stripping Provisions Of Section 9, Raises Constitutional Concerns.

The lack of correlation between the fees assessed by the Commission and the benefits conferred also raises serious constitutional concerns. Regulatory assessments are "fees" only when they bear a substantial relation to the costs of regulation; assessments that are not so related are "taxes," not fees.[1] Although Congress may delegate its authority to tax to an administrative agency, it may do so only so long as it provides standards to guide the agency "such that a court could ascertain whether the will of Congress has been obeyed."[2] This so-called "nondelegation doctrine" is premised on the notion that "private rights [will be] protected by access to courts to test the application" of the delegation.[3]

In this case, the delegation of its taxing authority fails because Congress has removed the jurisdiction of the federal courts to test the application of the delegation.[4] Although Congress may, in certain circumstances, remove federal court jurisdiction over an issue,[5] Congress may not, consistent with the Constitution, combine a delegation of its taxing authority with a jurisdiction stripping provision. If it could, Congress could confer unfettered discretion upon an unelected body to lay and collect taxes. This proposition runs contrary to the most fundamental precepts of our constitutional democracy.

Consequently, not only is the Commission's proposed increase in satellite regulatory fees inconsistent with the express terms of the Communications Act, but, if adopted, they would raise serious questions regarding the constitutionality of the entire regulatory fee scheme.

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[1] See, e.g., NCTA v. United States, 415 U.S. 336 (1974); cf. Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177 (1994).

[2] Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989) (quoting Mistretta v. United States, 488 U.S. 361 (1989)).

[3] Skinner, 490 U.S. at 219.

[4] See 47 U.S.C. § 159(b)(2) & (b)(3).

[5] See Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); see also Kline v. Burke Construction Co., 260 U.S. 226 (1922); Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938); Lockerty v. Phillips, 319 U.S. 182 (1943).

III. The Proposal In The NPRM To Again Require Payment Of The International Bearer Circuit Fee By Non-Common Carrier Satellite Operators Violates The Communications Act And Unfairly Disadvantages U.S.-Licensed Separate System Operators.

The Commission has again this year proposed to require non-common carrier satellite operators to pay the international bearer circuit fee. See NPRM Attachment H ¶ 38. This proposal not only contravenes the express terms of the Communications Act, it also unfairly disadvantages U.S.-licensed satellite operators *vis-a-vis* foreign-licensed satellite operators, whose circuits now may also be used to serve the United States, but who do not pay the international bearer circuit fee.

A. The Commission has no authority to collect regulatory fees for international bearer circuits from non-common carriers.

Section 9 of the Communications Act, which authorizes the Commission to collect regulatory fees to recover the cost of its enforcement, policy and rulemaking, user information, and international activities, was added by Section 6002(a) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 397 (Aug. 10, 1993). That Act, among other things, provided that "carriers" are to pay regulatory fees based on the number of international bearer circuits they provide. This provision now is reflected in Section 9(g) of the Communications Act, which lists international bearer circuit fees as those to be assessed against "carriers."

The term "carrier," in turn, has a specific meaning in the Communications Act. Under Section 3(10), the term "carrier" has the same meaning as "common carrier," *i.e.*, any person engaged as a common carrier for hire...." 47 U.S.C. § 153(10); see also GST Telecom, Inc., 12 FCC Rcd 3608 n.4 (1997). Section 9, therefore, is quite explicit about the entities from whom the Commission may collect international bearer circuit regulatory fees — common carriers. It does not authorize the Commission to impose international bearer circuit fees upon non-common carrier satellite operators.

Indeed, as a factual matter, the rationale upon which the Commission decided to extend bearer circuit fees beyond the terms of the statute is flawed. When the Commission determined, for the first time, that non-common carrier satellite operators would be required to pay the common carrier bearer circuit fee, it did so because it believed that non-common carrier satellite operators would offer

interconnected PSTN services in competition with common carriers following the 1997 elimination of the *de jure* prohibition on such traffic. See Assessment and Collection of Regulatory Fees for Fiscal Year 1997, 12 FCC Rcd 17161 (1997) ¶ 71.

In fact, as the record in the pending Comsat Dominance proceeding, 60-SAT-ISP-97, amply demonstrates, the amount of PSTN traffic actually carried by non-common carrier satellites is so small as to be inconsequential from a competitive perspective. Thus, not only are private satellite operators *legally* excluded from the category of entities from whom the Commission is authorized to recover international bearer circuit fees, they also do not, *as a factual matter,* compete significantly with the common carriers from whom the Commission is authorized to collect the fee.

B. Applying the bearer circuit fee to U.S.-licensed non-common carrier satellite operators will create a competitive disparity.

The Commission's proposal to assess non-common carrier satellite operators for international bearer circuit fees will create a competitive disparity. Under the Commission's DISCO II policies, 12 FCC Rcd 24094 (1997), foreign-licensed satellites now may be used to provide satellite service in the United States. Foreign satellite operators are not, however, required to pay U.S. regulatory fees. As a result, the satellite systems against which U.S.-licensed non-common carrier satellite operators actually compete will have a competitive advantage solely as a result of having used a foreign licensing administration.

At bottom, the regulatory fee schedule was not intended to skew the telecommunications markets and it certainly was not intended to discriminate unfairly against U.S.-licensed service providers. The imposition of bearer circuit fees upon non-common carrier satellite operators does both.

CONCLUSION

For the reasons set forth above, PanAmSat requests that the Commission lower the regulatory fee to be paid by geostationary space station operators to more closely reflect the actual costs of regulating geostationary satellites, and that it revise the regulatory fee schedule to comply with the Communications Act by excluding

international bearer circuits provided by non-common carrier satellite operators from the "International Bearer Circuit" fee category.

Respectfully submitted,

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